No. 89-839

In The

Supreme Court of the United States

October Term, 1989

STATE OF ARIZONA,

Petitioner,

vs.

ORESTE C. FULMINANTE,

Respondent.

On Writ of Certiorari To The
Arizona Supreme Court

PETITIONER'S REPLY BRIEF ON THE MERITS

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ARGUMENT

I

FULMINANTE'S CONFESSION WAS NOT COERCED BY SARIVOLA'S PROMISE OF PROTECTION.

A. The Arizona Supreme Court did not apply the correct test in addressing the voluntariness question

Amicus National Association of Criminal Defense Lawyers contends that the Arizona Supreme Court did not rely on the "inducement" rule adopted in *Bram v. United States*, 168 U.S. 532 (1897), and in fact relied on the totality of the circumstances in holding that Fulminante's confession to Anthony Sarivola was involuntary. (NACDL Br. 6-9.) The opinion below, however, belies that claim. Pet. App. A1; *State v. Fulminante*, 161 Ariz. 237, 778 P.2d 602 (1988), *rev'd*, 161 Ariz. 261, 778 P.2d 626 (1989). The Arizona Supreme Court made clear that it was Sarivola's alleged promise of protection that rendered Fulminante's confession involuntary:

> After the ruling on the motion to suppress, Sarivola testified that [Fulminante] had been receiving "rough treatment from the guys, and if [Fulminante] would tell the truth, he could be protected." *As discussed below this promise rendered the confession involuntary.*

Pet. App. A21; 161 Ariz. at 244, 778 P.2d at 609 n.1 (emphasis added). The Arizona Supreme Court also held that this Court's decision in *Bram* required that result:

> To be deemed free and voluntary within the meaning of the fifth amendment, a confession must not have been obtained by "any direct or implied promises, however slight, *nor by the exertion of any improper influence*" (emphasis

added). *Malloy v. Hogan*, 378 U.S. 1, 7 . . . (1964) (quoting *Bram v. United States*, 163 U.S. 532, 543 . . . (1897)).

Pet. App. A23; 161 Ariz. at 244, 778 P.2d at 609 (quoting *State v. Thomas*, 148 Ariz. 225, 227, 714 P.2d 395, 397 (1986)). Amicus has misread the decision below. The Arizona Supreme Court quite clearly held that, under this Court's decision in *Bram*, Sarivola's promise rendered Fulminante's confession involuntary. Thus, although the Arizona Supreme Court acknowledged that the totality-of-the-circumstances test was the correct test, it failed to apply the test in Fulminante's case.

B. Fulminante's confession was voluntary under the totality-of-the-circumstances test.

1. The record does not support Fulminante's claim that he was vulnerable to threats of physical violence.

Fulminante claims that the state erroneously argues that he was a hardened criminal whose will could not easily be overborne, and that he knew how to take care of himself in prison. (Resp. Br. 18.) He claims that the state ignores the difficulties he experienced when he was incarcerated for the first time at age 26. (Resp. Br. 19.) None of the alleged difficulties Fulminante experienced during his prior incarcerations warrants a finding that he was especially vulnerable to coercion.[1]

When he was 25 years old, Fulminante was sentenced to three years imprisonment following his conviction for

[1] The Arizona Supreme Court made no finding that anything in Fulminante's background or character made him especially vulnerable to coercion.

impairing the morals of a child. (Presentence Report, filed Feb. 5, 1986, at 88, 88h, 88q.) After his arrival at the New Jersey State Prison, Fulminante requested and was placed in protective custody because he felt "threatened." (*Id.* at 88x.)

In September of 1967, Fulminante was transferred to the state hospital after he became violent and broke up his prison cell. (*Id.* at 88x.) Fulminante told Dr. I.F. Bird, the psychiatrist who treated him, that he became violent after ingesting drugs purchased from another inmate. (*Id.* at 88x.) While at the state hospital, Fulminante constantly expressed to Dr. Bird his fear of returning to the state prison. (*Id.* at 88x, 88a1.) Because of this alleged fear, Fulminante was kept in the state hospital until his maximum sentence expired in May of 1968. (*Id.* at 88a1.) The probation officer noted in the presentence report:

> Indications are that the defendant's manifestation of bizarre tendencies was merely a ruse so that he would be incarcerated at the State Hospital instead of the State Prison in New Jersey.

(*Id.* at 88k.) The fact that Fulminante was never diagnosed as suffering from a mental illness supports the probation officer's conclusion that Fulminante used a ruse to get himself transferred to the state hospital.[2]

Instead of refuting the state's contention that Fulminante knew how to take care of himself while in prison, the records from the New Jersey State Hospital support

[2] Fulminante was first admitted to the New Jersey State Hospital in January of 1966, and was diagnosed as having a sociopathic personality disturbance, sexual deviation. (*Id.* at 88t, 88x.) Dr. Bird agreed with the above diagnosis. (*Id.* at 88u.)

that contention. Those records demonstrate that Fulminante knew that he could request prison officials to place him in protective custody if he either knew or believed that other inmates were going to harm him. The records also demonstrate that Fulminante was not above using a ruse to get himself transferred from the state prison to the state hospital. Even if Fulminante's bizarre behavior in 1967 was not a ruse, by his own admission it was triggered by an adverse reaction to drugs he voluntarily ingested. (*Id.* at 88x.) There is nothing to support Fulminante's claim that he exhibited bizarre behavior because "he could not emotionally handle the isolation of protective custody." (Resp. Br. at 19.)

2. The record does not support Fulminante's claim that he was in fear of the other inmates at Raybrook.

Fulminante claims that he feared being assaulted by other prisoners because of the rumor that he had murdered a child, and he implies that this case is one in which the state used physical coercion to obtain a confession. (Resp. Br. 17-19.) That claim is meritless.[3]

Fulminante did not testify at the pretrial suppression hearing or at trial, and there is no evidence that he was in fear of any prison inmate at the Raybrook facility. The

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[3] Fulminante erroneously asserts that Sarivola was paid to obtain Fulminante's confession. The record shows that Sarivola was not being paid for his services when he questioned Fulminante about Jeneane's murder. (J.A. 78-79, 81-82, 87-88, 108-109.)

evidence Fulminante cites, Resp. Br. 4, 19, consists of the 16-year-old New Jersey State Hospital records that were prepared when he was incarcerated in the New Jersey State Prison. There is no evidence that Sarivola, who had befriended Fulminante, had ever threatened Fulminante or had exaggerated the risk of assault on Fulminante. In fact, Fulminante conceded in the trial court that he never indicated that he was in fear of any other inmate at the Raybrook facility, J.A. 10; Fulminante conceded on appeal that, in light of his trial court stipulation, this fact was one of the "pertinent facts" regarding his suppression claim, Appellant's Opening Br. 3; and Fulminante concedes in this Court that "Sarivola did not threaten to personally hurt Fulminante," Resp. Br. 21.

Fulminante also knew that he could be protected by asking prison officials at Raybrook to put him into protective custody. Thus, he knew that he did not need to rely on Sarivola for protection. Further, there is no evidence that Fulminante had been assaulted by another inmate at Raybrook. Accordingly, there is no merit to Fulminante's claim that he was subjected to any actual, immediate, physical abuse or threat by Sarivola or any other prisoner when he confessed to murdering his stepdaughter.

3. The record does not support Fulminante's claim that government agents engaged in misconduct in obtaining his confession.

In response to the state's contention that there was no egregious police misconduct in the present case, Fulminante accuses both Agent Ticano and Sarivola of

reprehensible conduct. Fulminante's allegations of government misconduct are not supported by the record.

(a) Agent Ticano's conduct.

Somewhat surprisingly, Fulminante criticizes the actions of FBI Agent Walter Ticano. Fulminante maintains that Agent Ticano's conduct was offensive to a civilized society since he gave Sarivola, a " 'professional strong arm man [,]' substantial financial and other incentives to 'shake down' his prey for information." (Resp. Br. 20.) There is nothing to that claim – which Fulminante now makes for the first time – except inflated rhetoric. Agent Ticano did not "exert pressure on Sarivola to obtain a confession," Resp. Br. 21, as Fulminante now claims. In truth, Agent Ticano simply told Sarivola " 'to find out more about it' . . . before I can act upon it, or words to that effect," as Fulminante conceded in the trial court. (J.A. 10.) Agent Ticano would have been remiss in his duty as an officer of the law had he failed to attempt to obtain further information that would either verify the rumor or prove it false.

There is nothing unconstitutional (or unconscionable) about using members of organized crime as government informants. As the Court has recognized, "[a]dmissions of guilt are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran v. Burbine*, 475 U.S. 412, 426 (1986) (citations omitted). The use of informants or other stratagems in the discovery of evidence of a crime has been accepted by this Court as a

legitimate investigative technique for nearly a century.[4] As Judge Learned Hand once wrote: "Courts have countenanced the use of informers from time immemorial [.] * * * Entrapment excluded, * * * decoys and other deception are always permissible." *United States v. Dennis*, 183 F.2d 201, 224 (2d Cir. 1950), *aff'd on other grounds*, 341 U.S. 494 (1951).

(b) Sarivola's conduct.

Fulminante insinuates that, since Sarivola had been convicted of a crime involving the use or threat of violence, he used threats or force on targeted citizens during the period of time that he acted as an informant for the FBI. There is nothing in the record to support such a claim. In fact, Sarivola himself was the victim of an attempted assassination during the time he was working for the FBI as an informant. (J.A. 89, 94.)

Fulminante, however, claims that Sarivola's conduct was extremely coercive because he "gave Fulminante the choice of physical harm at the hands of hostile inmates or

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[4] *E.g., Grimm v. United States*, 156 U.S. 604, 610-611 (1895); *Goode v. United States*, 159 U.S. 663, 669 (1895); *Rosen v. United States*, 161 U.S. 29, 42 (1896); *Andrews v. United States*, 162 U.S. 420, 423 (1896); *Price v. United States*, 165 U.S. 311, 315 (1897); *Sorrells v. United States*, 287 U.S. 435 (1932); *Lopez v. United States*, 373 U.S. 427, 450 (1963); *Lewis v. United States*, 385 U.S. 206, 211 (1966); *Hoffa v. United States*, 385 U.S. 293, 304 (1966); *United States v. White*, 401 U.S. 745 (1971); *Procunier v. Atchley*, 400 U.S. 446 (1971); *United States v. Russell*, 411 U.S. 423 (1973); *Hampton v. United States*, 425 U.S. 484 (1976); *Weatherford v. Bursey*, 429 U.S. 545 (1977); *Kuhlmann v. Wilson*, 477 U.S. 436 (1986); *Illinois v. Perkins*, No. 88-1972 (June 4, 1990).

receipt of protection in exchange for a confession." (Resp. Br. 13.) If those were the only two choices available to Fulminante, his claim that Sarivola's promise of protection was coercive would be more persuasive. Fulminante, though, had a third choice available to him. He could have done the same thing that he did the first time he went to prison. He could have requested prison officials to place him in protective custody. There is nothing to indicate that Raybrook prison officials would have refused such a request.

C. Fulminante's reliance on *Payne v. Arkansas* is misplaced.

Respondent and the NACDL claim that this case is not materially different from *Payne v. Arkansas*, 356 U.S. 560 (1958). That claim is in error.

The undisputed evidence in *Payne* showed that:

> [P]etitioner, a mentally dull 19-year-old youth, (1) was arrested [for murder] without a warrant, (2) was denied a hearing before a magistrate at which he would have been advised of his right to remain silent and of his right to counsel as required by Arkansas statutes, (3) was not advised of his right to remain silent or of his right to counsel, (4) was held incommunicado for three days, without counsel, advisor or friend, and though members of his family tried to see him they were turned away, and he was refused permission to make even one telephone call, (5) was denied food for long periods, and, finally, (6) was told by the chief of police "that there would be 30 or 40 people there in a few minutes that wanted to get him," which

> statement created such fear in petitioner as immediately produced the "confession."

356 U.S. at 567. Not surprisingly, this Court held that Payne's confession was coerced, "particularly [by] the culminating threat of mob violence." *Id.* at 567.

By contrast, the undisputed evidence in Fulminante's case shows that Fulminante's friend, Sarivola, offered to protect Fulminante from a potential assault by other prisoners, who had been giving him a rough time. The offer was made during a casual conversation between the two men while they were taking a stroll around the prison grounds.

Since Fulminante was unaware that Sarivola was an FBI informant, there existed none of "the danger of coercion result[ing] from the interaction of custody and official interrogation," that existed in *Payne*. *Illinois v. Perkins*, No. 88-1972, slip. op. at 6. Unlike the youth in *Payne*, who was totally dependent upon his jail custodians to protect him from mob violence, Fulminante was not dependent on Sarivola for protection or for anything else. Unlike the youth in *Payne*, who feared the mob outside the jail, Fulminante never expressed fear of the other inmates. Further, if he did fear the other inmates, he had an option that Payne did not have – Fulminante could have asked prison officials for protection.

Fulminante, nevertheless, argues that his case is indistinguishable from *Payne* because, like the defendant in *Payne*, he initially denied his guilt and only confessed when he was promised protection. (Resp. Br. 22.) The fact that Fulminante confessed a short time after Sarivola promised to protect him is only one factor that must be

considered in determining if the promise coerced his confession. Further, the preceding factor is virtually the only similarity between the two cases.

The defendant in *Payne* testified that his confession to the police chief did not contain the truth, and that he confessed because he was "more than afraid" that the police chief would "let [the mob] in." 356 U.S. at 566. Fulminante, on the other hand, never testified that he falsely confessed in order to obtain Sarivola's protection because of his fear. This Court has noted that: "Questioning by captors, who appear to control the suspect's fate, may create mutually reinforcing pressures that the court has assumed will weaken the suspect's will, but where a suspect does not know that he is conversing with a government agent, these pressures do not exist." *Illinois v. Perkins*, No. 88-1972, slip. op. at 6. Clearly, the threats of Payne's captors to turn him over to a mob overbore his will and wrung from him an involuntary confession. By contrast, Fulminante was not subjected to similar coercive tactics by persons who appeared to control his fate. Thus, his will was not overborne and his confession to Sarivola was voluntary.

II

HARMLESS-ERROR ANALYSIS SHOULD APPLY TO THE ERRONEOUS ADMISSION OF AN INVOLUNTARY CONFESSION.

Bram held that the erroneous admission of a defendant's confession requires reversal in every case. Although Fulminante and the NACDL endorse that rule, they make no attempt to defend the reasoning of the *Bram*

decision. Instead, their principal defense of that rule is that stare decisis considerations militate against overruling it. (Resp. Br. 24-27; NACDL Br. 18-19.) That argument is wholly unpersuasive.

Stare decisis is a venerable legal doctrine and serves valuable purposes, but the perpetuation of outdated and irrational legal rules is not among them. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.").

Bram was decided 70 years before the court held in *Chapman v. California*, 386 U.S. 18 (1967), that constitutional errors do not require reversal in every case. The pre-*Chapman* decisions cited by Fulminante and amicus applying *Bram* are therefore beside the point. Moreover, this Court has never re-examined *Bram* since its decision in *Chapman*.

Neither *Chapman* nor the post-*Chapman* decisions cited by Fulminante addressed this question. Each one involved a different harmless-error question, *see Chapman, supra* (comment on defendant's silence at trial); *Rose v. Clark*, 478 U.S. 570 (1986) (jury instruction with an erroneous rebuttable presumption), or did not involve a harmless-error issue at all, *see Lego v. Twomey*, 404 U.S. 477 (1972) (whether a State must prove beyond a reasonable doubt that the defendant's confession is voluntary); *Mincey v. Arizona*, 437 U.S. 385 (1978) (whether the defendant's confession was coerced); *New Jersey v. Portash*, 440

U.S. 450 (1979) (whether testimony given under a grant of use immunity may be used to impeach the defendant at trial).[5] Under these circumstances, stare decisis is, at best, a weak basis for refusing to reconsider *Bram*.

There is no good reason to have a per se rule of reversal applicable only to the erroneous admission of an involuntary confession.[6] One of the most common contemporary applications of the harmless-error doctrine is to the erroneous admission of evidence. This Court has frequently held that the erroneous admission of evidence can be harmless. *Satterwhite v. Texas*, 486 U.S. 249 (1988) (statements of the defendant); *Moore v. Illinois*, 434 U.S. 220, 232 (1977) (identification evidence); *Brown v. United States*, 411 U.S. 223, 231-232 (1973) (out-of-court statement of a nontestifying co-defendant); *Chambers v. Maroney*, 399

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[5] Fulminante and amicus also cite the plurality opinion in *Connecticut v. Johnson*, 460 U.S. 73, 81 (1983), as another case in which the Court allegedly reaffirmed *Bram*. That argument is thrice flawed: only a plurality referred to this point; the reference was dictum since *Johnson* involved an entirely different question (a jury instruction containing an erroneous rebuttable presumption); and in any event *Johnson* was overruled by *Rose v. Clark*, 478 U.S. 570 (1986).

[6] Amicus NACDL claims that the United States conceded in its amicus brief that adoption of a rule of automatic reversal is "reasonable and efficient" because a confession is "extremely powerful evidence that is likely to be prejudicial in most cases." (NACDL Br. 24.) The NACDL has misrepresented the argument made by the United States by omitting a key phrase from the sentence quoted and by taking the sentence out of context. The United States did not make the concession the NACDL claims it made, and, in fact, argued that a rule of automatic reversal is neither reasonable nor efficient. (United States Br. 24.)

U.S. 42, 52-53 (1970) (physical evidence). Moreover, the Court has twice specifically held that harmless-error analysis applies to the erroneous admission of a defendant's statements obtained from him in violation of his right to counsel under the sixth-amendment counsel clause. *Satterwhite v. Texas*, 486 U.S. at 256; *Milton v. Wainwright*, 407 U.S. 371 (1972). The Court also recently remanded a case to the lower courts for them to determine whether the admission of a defendant's statements obtained in violation of *Miranda* was harmless. *Pennsylvania v. Muniz*, No. 89-213 (June 18, 1990), slip op. 22 n.22; *id.* slip op. 3 (opinion of Rehnquist, C.J.) (same). Accordingly, the *Bram* rule stands alone, because in no other instance has this Court declined to apply harmless-error analysis to the erroneous admission of evidence.

Fulminante and the NACDL contend that the "fundamental nature of the right involved" renders it immune from harmless-error analysis. (NACDL Br. 21; *see also* Resp. Br. 25-26.) But all constitutional rights are in some sense "fundamental"; that argument does not distinguish this right from any other. In addition, the rule excluding a defendant's involuntary confession is ultimately a trial right of the defendant. As the court explained in *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1060 (1990) (citation omitted), "[t]he privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." Since the rule here is ultimately a constitutional rule of evidence, it should be treated in the same manner

as other such rules, all of which are subject to harmless-error analysis.

Amicus NACDL contends that a harmless-error analysis would encourage the police to coerce confessions from suspects. (NACDL Br. 21-22.) A similar argument could be made in any harmless-error case. Moreover, that argument does not distinguish fifth-amendment violations from fourth or sixth-amendment violations, to which the Court has applied the harmless-error doctrine. *See Chambers v. Maroney*, 399 U.S. at 52-53; *Satterwhite v. Texas*, 486 U.S. at 256; *Milton v. Wainwright*, 407 U.S. at 372-373, 378-379. In any event, amicus' argument is implausible given the heavy burden (beyond a reasonable doubt) that the state must overcome to prove that an error is harmless. *Cf. Murray v. United States*, 487 U.S. 533, 539-540 (1988) (rejecting similar argument in the context of the fourth-amendment exclusionary rule).

III

THE ADMISSION OF FULMINANTE'S CONFESSION TO ANTHONY SARIVOLA WAS HARMLESS BEYOND A REASONABLE DOUBT.

Applying the *Chapman* standard, the Arizona Supreme Court found that the admission of Fulminante's confession to Anthony Sarivola was harmless beyond a reasonable doubt, for several reasons: Fulminante's later statement to Donna Sarivola was not the "fruit of the poisonous tree" and therefore was admissible, Pet. App. A24-25; 161 Ariz. at 244, 778 P.2d at 609; Fulminante's confession to Anthony Sarivola "was cumulative of the admissible second confession" to Donna Sarivola; and "due to the overwhelming evidence adduced from the

second confession, if there had not been a first confession, the jury would still have had the same basic evidence to convict [Fulminante]," Pet. App. A29-30; 161 Ariz. at 246, 778 P.2d at 611. That determination does not warrant reconsideration by this Court. *See Francis v. Franklin*, 471 U.S. 307, 326 n.10 (1985) ("The primary task of this Court upon review of a harmless-error determination by the court of appeals is to ensure that the court undertook a thorough inquiry and made clear the basis of its decision.")

A. There was overwhelming evidence of Fulminante's guilt, even without his confession to Sarivola.

Fulminante claims that the Arizona Supreme Court erred in holding that, even after the confession to Sarivola is discounted, there is still overwhelming evidence of his guilt. That holding is correct.

Fulminante told Donna Sarivola that he took his stepdaughter out into the desert where he raped, beat, and choked her. (J.A. 168.) After forcing her to beg for her life, he killed her by shooting her two or three times in the head. (J.A. 168-69.) The evidence showed that the victim's body was found in the desert. A ligature was tied around her neck. She had died from two gunshot wounds to the head. Pet. App. A6-7; *State v. Fulminante*, 161 Ariz. at 240, 778 P.2d at 605. The Arizona Supreme Court correctly determined that the physical evidence fully corroborated Fulminante's confession to Donna Sarivola.

1. Claim that Donna Sarivola's testimony is highly suspect.

Fulminante argues that there was not overwhelming evidence of his guilt because Donna Sarivola's testimony

regarding his confession is "highly suspect." For example, he argues that Donna Sarivola's testimony is suspect because she testified that, a short time after they met, Fulminante confessed to a brutal murder in response to her casual inquiry why he was going to Vince DeMarco's house. While it may be somewhat unusual for a murderer to confess to a new acquaintance in response to a casual question, it was not that unusual for Fulminante to freely discuss the murder of his stepdaughter in the presence of Sarivola. As Fulminante argued in the Arizona Supreme Court:

> It should be noted that the confession to Donna was made in the presence of Anthony. This is the classic case of letting "the cat out of the bag." If Fulminante had already confessed to Anthony, it would have made little sense to change his story in Anthony's presence, in response to Donna's question as to why Fulminante was not going to visit his own relatives.

(Motion for Reconsideration filed Aug. 31, 1988.)

2. Claim that Fulminante's confession to Donna Sarivola was contradicted by the physical evidence.

Fulminante claims that the physical evidence contradicted his confession to Donna Sarivola. He points out that the medical examiner testified that there was no evidence that the victim was beaten or that she was sexually assaulted. Because the victim's body was badly decomposed by the time it was found, it was impossible to tell whether Fulminante had beaten or sexually assaulted his stepdaughter prior to killing her. Although tests for spermatozoa and seminal fluid were negative,

the medical examiner testified that rarely were spermatozoa and seminal fluid found in a decomposing female body. (J.A. 188.) Further, Fulminante's confession regarding the sexual assault was consistent with the evidence found at the murder scene. The victim's jeans had been unzipped and pulled down over her buttocks. [R.T. of Dec. 9, 1985 (Trial) Vol. 4 at 20-21.] While inconclusive, the physical evidence did not contradict Fulminante's admissions regarding the sexual assault of the victim.

Fulminante argues that there was no evidence to corroborate his admission to Donna Sarivola that he choked the victim prior to shooting her. A ligature[7] had been tied around the victim's neck prior to her death. The medical examiner testified that the ligature did not contribute to the victim's death, but that it could have been used to effect non-fatal choking of the victim. [J.A. 187; R.T. of Dec. 16, 1986 (Trial) Vol. 9 at 63.] The ligature found around the victim's neck corroborates Fulminante's admission that he choked her. The fact that the ligature did not contribute to the victim's death does not contradict Fulminante's admission that the choking occurred.

B. No unduly prejudicial evidence was admitted in connection with Fulminante's confession to Sarivola.

As a second ground in support of his claim that the erroneous admission of his confession to Sarivola did not

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[7] The ligature was a piece of old worn towel. [R.T. of Dec. 6, 1986 (Trial) Vol. 4 at 24-26.] Mary Hunt testified that it looked like one of the Fulminantes' old worn towels. [R.T. of Dec. 17, 1986 (Trial) Vol. 10 at 21-22.]

constitute harmless error, Fulminante argues that extremely prejudicial evidence was admitted solely in conjunction with his confession to Sarivola. The state disagrees that the evidence in question was unfairly prejudicial, or that it would necessarily have been precluded if the confession to Sarivola had not been admitted.

1. Fulminante's prior convictions and incarcerations.

Even if the trial court had excluded Fulminante's confession to Sarivola, evidence regarding Sarivola's relationship with Fulminante, and the conversations the two men had together while in prison was admissible under Arizona law in order to place Fulminante's later conversation with Donna in context. *See* Rule 404(b), Ariz. R. Evid. (proof of defendant's other bad acts admissible for purposes other than showing action in conformity therewith); *State v. Chaney*, 141 Ariz. 295, 686 P.2d 1265 (1984) (evidence of defendant's prior acts of burglary and theft properly admitted in murder prosecution to make events more comprehensible to jury); *State v. McCall*, 139 Ariz. 147, 677 P.2d 920 (1983), *cert. denied*, 467 U.S. 1220 (1984) (evidence in murder prosecution of plan of defendant and coconspirators to commit another murder properly admitted to show motive or to complete the story for the jury).

2. Fulminante's reputation for being untruthful.

Fulminante did not object at trial to the admission of evidence that he had a poor reputation in prison for

truthfulness. Moreover, the Arizona Supreme Court specifically found that the alleged error of defense counsel in failing to object to the admission of the credibility evidence was nonprejudicial, as the evidence did not affect the result of the trial. Pet. App. A93-94; *State v. Fulminante*, 161 Ariz. at 260, 778 P.2d at 625.

3. Evidence of Sarivola's reputation for truthfulness and as an organized crime figure.

Fulminante claims that he was prejudiced because evidence regarding Sarivola's reputation for truthfulness, and evidence of his knowing association with Sarivola, an organized crime figure, was introduced at trial. Since Fulminante attacked Sarivola's credibility, evidence of Sarivola's reputation for truthfulness was properly admitted pursuant to Rule 608(a), Arizona Rules of Evidence. While evidence of Sarivola's organized crime connections may not have been relevant if the confession to Sarivola was inadmissible, that evidence reflected on Sarivola's character, not on that of Fulminante. In view of the overwhelming evidence of Fulminante's guilt, the evidence of which Fulminante complains could not possibly have affected the verdict. Fulminante has not shown that he was prejudiced by admission of the evidence in question.

The Arizona Supreme Court's inquiry whether the admission of Fulminante's confession to Sarivola was harmless error was thorough. Further, that court clearly set forth the basis for its decision that his second confession to Donna Sarivola "established his guilt." Pet. App. A29; *State v. Fulminante*, 161 Ariz. at 245-46, 778 P.2d

610-11. This Court should reject Fulminante's claim that the Arizona Supreme Court erred in its initial finding of harmless error.

CONCLUSION

This Court should reverse the Arizona Supreme Court's judgment.

Respectfully submitted,

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